# THE MICHIGAN JUDICATURE ACT OF 1915.

## II. Forms of Action.

THE Judicature Act devotes a tiny chapter of two sections to Forms of Action,[1] although only the first section really deals with that subject. In this section it is provided that four ordinary common law actions, assumpsit, trespass on the case, replevin and ejectment, and three extraordinary actions, certiorari, mandamus and quo warranto, are retained, but all other actions are abolished. The action of assumpsit is declared to be proper in all cases where assumpsit, debt or covenant were formerly used, and trespass on the case is declared to be proper wherever case, trespass or trover were formerly maintainable. Assumpsit thus becomes the universal contractual remedy and case the universal tort remedy, so far as damages are concerned. Penalties and forfeitures are to be recovered by the action of assumpsit. But in respect to certain torts—trespass to lands, fraud and deceit and the conversion of personalty into money—the plaintiff shall have his election to sue in case or assumpsit.

The situation affecting the ordinary actions is somewhat different from that relating to the extraordinary actions retained by the Act, and a clearer view of the purpose and extent of the reforms effected may be had by a separate consideration of the two groups of actions.

### (*a*) The Ordinary Actions.

In passing sentence of death upon debt, covenant, trespass and trover, the legislature was, in appearance at least, only pursuing a course which has marked the history of the common law for many centuries. Nothing has been more characteristic of the law of England than its forms of action. The modern lawyer knows the names of but few of them, but hundreds are found among the records of the mediæval law courts.[2] Rights were closely wedded to forms in the early law, and forms of action were in truth the only means or instruments by which our forefathers were able to dispense justice.

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[1] Chap. XI.

[2] "How many forms of action were there? A precise answer to this simple question would require a long prefatory discourse, for we should have to draw some line between mere variations upon the one hand and more vital differences on the other; * * * We might easily raise the tale of forms to some hundreds, but perhaps we shall produce the right effect if we say that there were in common use some thirty or forty actions, between which there were large differences." 2 Pollock & Maitland: Hist. of Eng. Law, 564.

Gradually new forms arose and old forms passed away. Every age retained or developed those adapted to its wants and discarded such as had lost their practical value. Thus the formed actions of the common law have always been in a state of flux, reflecting the needs of the day with only the conventional reverence for the past which conservatism always produces.

"Our forms of action," write Pollock and Maitland, "are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing material. They are institutes of the law; they are—we say it without scruple—living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigour, usefulness and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, others live to see their children and children's children in high places. The struggle for life is keen among them and only the fittest survive."[3]

If we were looking for a strict counterpart or continuation of the common law evolution of actions in the Judicature Act we should expect to find that those actions which had proved to be ineffective or had become outgrown would be the ones to go, and the vigorous and usable actions would be the ones to survive. But in this case no such situation is disclosed. The actions so summarily abolished by the legislature were by no means obsolete and showed no inherent tendency to gravitate toward the scrap-heap. They were all of them familiar tools for litigation, and their names and the rules which governed their use were commonplaces to every lawyer. Why, then, should they have been marked for the slaughter?

As a matter of fact it can hardly be contended that one modern action has any special advantage over another. Each has its own place, with more or less overlapping upon others, and none could be abolished without leaving a hole in the remedial structure. The Judicature Act did not contemplate the withholding of any remedy. What it really did was not to abolish four actions and retain two. It abolished all the common law actions for the recovery of damages and in their place it substituted two entirely new actions called "trespass on the case" and "assumpsit." It divided all causes of action for damages into two classes, those based on contract and those based on tort, and declared that the former should be called "case" and the latter "assumpsit." In doing so it employed a common but always misleading method—it used old terms, terms which had been worked over and thought over for centuries, terms which were full of

[3] 2 Hist. of Eng. Law, 561.

historical significance and which had become interwoven into the very fabric of the common law, and decreed that henceforth they should mean something entirely different. Such arbitrary and forced changes in the meanings of words are always confusing. We break with the past but retain its language to sooth our feelings, and then, under the spell of the old, familiar terms, we forget that the break was ever made.

It is quite plain that we have not retained the action of assumpsit nor the action of trespass on the case. We have not retained any of the common law actions for the recovery of damages. All are gone, partly by express abolition, partly by implied abolition. In the place of six old actions we now have two new ones. If they had been called "tort action" and "contract action," no one would have been confused or misled. They would have carried the visible badge of novelty. But their character is not dependent upon their names. They are just as new, just as different from any of the common law actions, as though the old names had been abandoned also. This is an outstanding feature of the Act which should not be lost sight of. Old rules and doctrines of assumpsit and case no longer apply; the historical development of those actions no longer throws light on their present scope and meaning; the continuity is gone; the bottles are old but the wine in them is new. Procedure, as far as it relates to damages, has taken a dual instead of a multiple form,—the substantive distinctions between tort and contract are now translated into the field of remedies in lieu of all other distinctions applicable to ordinary actions for damages.

The attempted retention of assumpsit and case was doubtless a concession to the prejudices of a conservative profession. There has always been a strong antipathy among the lawyers of this State to Code Pleading, and nothing which too closely resembled that much distrusted system could have passed the legislature. "Assumpsit" and "trespass on the case" sounded entirely orthodox and respectable, and exorcised the bogy of a "Code" defection. But the Code, while undoubtedly subject to many just criticisms, is entirely sound and logical on the point here involved, namely, the forms of personal actions. It openly and frankly abolished them all and substituted a single action in their place. The Judicature Act covertly, but no less effectively, has abolished them all and substituted two actions in their place. This is illogical and unnecessary. One action will equally serve the purposes of two and it is therefore much better. If the old actions are to go why not provide an entirely modern substitute? Why stop short in the process of simplification?

The origin of forms of action must be sought in history, not in

logic. They were incidental to the old English system of original writs. After the Norman conquest the source of judicial power was deemed to be the King. The courts were his courts, and the judges his judges. They had only the jurisdiction which he gave them, and the royal method of conferring jurisdiction was through the royal writ. A suitor in the king's court had to obtain the king's order to his judges to take jurisdiction of the case, as well as to get jurisdiction over the person of the defendant, and the original writ performed both functions. It was at once a notice to the defendant to come into court and an authorization to the court to take jurisdiction of the controversy. Now if the writ was the court's warrant for taking up the case, it was clear that the writ must specify the nature of the action, for the king gave no *carte blanche* to his judges. There were as many different kinds of writs as there were different kinds of controversies. Every writ was good for all the cases which could be construed to fall within its terms, but for no others. New forms of writ were devised to meet new needs, and when once a form of writ was prepared, copies of it were issued to all who thought they could use it. The writs gave form to the actions, and all actions which could be prosecuted under the same writ were therefore of the same form. There were as many forms of action as there were forms of writs.

But under our theory of government the courts no longer need a special warrant for trying cases, for the judicial power to adjudicate all controversies is given to them originally and directly from the people. Therefore forms of writs cease to have any utility. Original writs in the old sense therefore necessarily disappear and judicial writs take their place as notices to defendants that they must appear before the court. The nature of the case need not be specified in the notice or summons, for the defendant may obtain full information from the pleadings. Hence a single form of summons is sufficient, and the only compelling reason for the different forms of action has disappeared.

Logically the whole question is one of convenience in judicial administration. If many forms of action are better adapted for general use they should be employed; but if fewer forms result in a simpler and more effective procedure, then fewer should be used. So far as personal actions for damages are concerned, there does not seem to be the slightest occasion for more than one form—a simple civil action. The single action has been used in England and in the Code States of this country with complete success. All the strictly personal actions heretofore in use in Michigan—assumpsit, debt, covenant, trespass, case and trover—are adapted to identical pro-

cedural treatment. The same form of summons is adapted to all of them, the same kind of statement of facts will constitute a cause of action in each, the same kinds of pleadings will raise the same kinds of issues in each, and the incidents of the trial, judgment and execution are the same in all of them. So far as these actions are concerned the Judicature Act stopped just short of the logical and practical goal.

When we turn to the actions for the recovery of specific property the case is somewhat different. Replevin and ejectment involve procedural incidents which are not found in the actions sounding solely in damages, and these features tend to separate and differentiate them from actions of the latter kind. In the Code States the effort was made to reduce all actions to a single form, and general provisions in the Codes of Civil Procedure declared that all forms were abolished and that thereafter there should be but one form for the enforcement of all rights and the redress of all wrongs, to be known as a civil action. But even in the original New York Code it was seen that special provisions were needed to cover the case of replevin, and a separate chapter of nine sections was drawn up for this purpose.[4] But lest the new practice should be contaminated by any of the old doctrines of the common law this new Code scrupulously avoided the word replevin and all its derivatives, substituting the name "Claim and Delivery." But the characteristics of the action under the new name were so strikingly similar to those which distinguished the old action that gradually the old terms came back, and the present New York Code has an elaborate article of forty-seven sections which in Chase's Code is frankly called "Action of Replevin" and which uses the term replevin, replevy or replevied many times.[5] Actions to recover possession of personal property are in all jurisdictions necessarily in a class by themselves, and there is no advantage in attempting to carry out a forced uniformity by suppressing a distinguishing nomenclature. "The rules of pleading in replevin cases are specially provided by statute and constitute an exception to the ordinary rules governing other cases," says the Court in a typical western Code State.[6] If, then, in spite of well directed efforts to reduce all actions to uniformity the Codes have been forced to recognize the claim of replevin to independent existence, the Judicature Act only showed an appreciation of fundamental principles and of the results of experience in retaining this action.

[4] Laws of New York, 1848, Ch. 379, Tit. 7, Ch. 2.
[5] Chase's Pocket Code of Civ. Proc., Ch. 14, Tit. 2, Art. 1.
[6] Woodbridge v. DeWitt, (1897), 51 Nebr. 98.

Ejectment is not so clear a case of separate identity, since it lacks the provisional summary features of replevin. The original New York Code seems to have contemplated the feasibility of merging this action with the rest, but experience showed that a different treatment was required in various respects, so that a body of statutory provisions relating to the practice in "Actions to Recover Real Property" grew up, making an Article consisting eventually of thirty-five sections.[7] However, in most of the Code States and in England it has been found practicable to employ the ordinary rules or practice almost exclusively in actions for the recovery of possession of real property, so that the retention of ejectment is less fully justified than the retention of replevin.

(*b*) THE EXTRAORDINARY ACTIONS.

Certiorari, mandamus and quo warranto have been retained.

It is possible to dispense with the writ of certiorari, and it has been done in a few jurisdictions. Thus in Ohio both writs of error and writs of certiorari are abolished by statute, and the courts are given power to order transcripts of proceedings to be furnished as formerly they could do by such writs.[8] And the same thing has been done in Kansas[9] and Nebraska.[10] In a number of states the writ has been called a writ of review.[11] But in the great majority of our states, as well as under the very enlightened English practice, the writ of certiorari is still the standard method of obtaining a review of the acts of inferior courts and officers or boards exercising quasi judicial functions. It is hard to see what real advantage is to be gained by merely changing its name, and while it would be possible to make the practice in certiorari cases formally identical with that in the ordinary actions, by substituting a declaration in place of the affidavit now used, and a summons or rule to plead in place of the writ, and a plea in place of the return, such changes would not seem to be entirely free from criticism. The affidavit does not contain a substantially full statement of the facts on which the action of the court is to be founded, but these facts really appear in the return. Again, the return, unlike a plea, is an official statement which is to be taken as true, so that only questions of law can be raised in regard to those facts. The question raised by the action of certiorari is one respecting the legal correctness of judicial or quasi

[7] Chase's Pocket Code of Civ. Proc., Ch. 14, Tit. 1, Art. 1.

[8] Ohio Gen. Code, § 12282.

[9] Gen. St., 1901, § 5050.

[10] Comp. St., 1911, § 7175.

[11] California, Kerr's Code Civ. Pro., § 1067; Montana, Rev. Codes, 1907, § 7202; Oregon, Lord's Laws, § 602; Utah, Comp. L., 1907, § 3629.

judicial acts, rather than of the existence and infringement of private rights. In every ordinary personal action there must be set up a "cause of action," which is defined to be a statement of facts showing a primary right in the plaintiff and a violation of that right by the defendant. But in certiorari no such cause of action is involved. Hence to attempt to abolish certiorari as a distinct remedy and to enforce parties to employ the forms applicable to ordinary actions at law, would be a surrender of substance to form, and a worship of uniformity at the expense of logical discrimination.

Mandamus is much more susceptible to uniform treatment than certiorari. Here we are always concerned with the existence of a cause of action in the ordinary sense, for the question involved is not the propriety of past official conduct but the right of the applicant to force the doing of an official act for his own benefit or advantage. The petition in mandamus, as used in this State, is required to state the facts on which the party relies, exactly as does a declaration, and the affidavit (or return to the alternative writ) is an answer to those facts consisting of denials or facts in confession and avoidance, which in theory is quite comparable to a plea, though practically more like an answer in chancery. To the answer the person prosecuting the action may, for the purpose of framing an issue, be allowed to plead exactly as in case of a replication.[12] The fact that the writ or order to show cause issues after the petition is filed, instead of in advance of it as in case of a summons preceding a declaration, is not at all an important difference. In fact our practice of commencing ordinary actions by declaration and rule to plead is a very similar proceeding, and the rule to plead in a mandamus case would merely become a special order rather than a common order as now employed in ordinary actions. In a number of states actions of mandamus are commenced by filing the same pleading as in other actions.[13]

But even if these changes in the practice were made, we should still have to retain mandamus as a separate category of procedure, because we have not adopted a single civil action but still retain two actions, assumpsit and case, in neither one of which would mandamus properly be included. So that although the action could have been made much more like the ordinary actions without any great difficulty, which would doubtless have been a real advantage in unifying and standardizing judicial proceedings, we should not have thereby avoided doing what the Judicature Act did in retaining the separate action of mandamus.

[12] Wagner v. Gladwin Circuit Judge, 131 Mich. 129.

[13] See, for example, the Ohio Statute, Gen. Code, §§ 12283-12302.

In quo warranto, again, we have a situation very similar to an ordinary action, where the attorney general or relator sets up in substantially the style of a common declaration the facts which constitute a cause of action against the defendant. The information, accordingly, although its allegations are very general, is a close counterpart of a declaration, the summons employed is precisely the same sort of writ as that used in ordinary actions, and the plea to the information is of course the same sort of pleading in form as a plea to a declaration, though in substance it aims rather to show a title than a defense. The replication authorized to be filed to the plea is clearly an ordinary pleading. The discretionary feature, when it applies, is no different from that in mandamus and would merely result in requiring an order for the issuance of the summons or the substitution of a special rule to plead.

That the assimilation of this action to an ordinary action is feasible has been amply shown by the experience of many jurisductions. Thus, in Ohio[14], California[15], Iowa[16], and Kansas[17], the ordinary forms of pleadings and proceedings are employed, with only such incidental special provisions as necessarily result from the peculiar nature of the rights and liabilities involved and the means necessary to enforce them. In place of the peculiar practice of a suggestion of damages, a regular action may be brought by the person whose right has been adjudicated.[18]

But as pointed out above in connection with the action of mandamus, our two ordinary actions of assumpsit and case do not adapt themselves very well to the incorporation of this action, and so long as we keep that dual system of ordinary actions this extraordinary action should probably be retained. And it must be conceded that in many states which have abolished all the ordinary forms, and now use only the "civil action" so called for all ordinary purposes, quo warranto is still prosecuted by means of an information, so that in spite of our failure to provide for a single ordinary action we are at least abreast of these states in respect to quo warranto.

(To be Continued.)

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[14] Gen. Code, § § 12303-12344.

[15] People v. Sutter St. Ry. Co. (1900), 129 Cal. 545, 547.

[16] Code, 1897, § § 4313-4335.

[17] Gen. Stat., 1909, § § 6275, et seq.

[18] Kansas, Gen. St., 1909, § 6281; Iowa, Code, 1897, § 4323.